JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDMUND PIETZAK AND ERIN HUDSON, individually and on behalf of all others similarly situated, Plaintiffs, v. MICROSOFT CORPORATION AND HELLOWORLD, INC., Defendants.	CASE NO. CV 15-5527-R ORDER GRANTING DEFENDANT MICROSOFT'S MOTION TO DISMISS AND DEFENDANT HELLOWORLD'S JOINDER

Before the Court are Defendant Microsoft's Motion to Dismiss and Defendant HelloWorld's Joinder to Defendant Microsoft's Motion to Dismiss, which were filed on September 23, 2015. Having been briefed by the parties, this matter was submitted on the papers on November 11, 2015.

On a motion to dismiss, the trial court takes all well-pleaded facts in the complaint to be true and determines whether, based upon those facts, the complaint states a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); s*ee Alperin v. Vatican Bank*, 410 F.3d 532, 541 (9th Cir. 2005). To state a claim, the complaint must contain factual assertions which make the

claimed relief not merely possible, but "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although factual assertions are taken as true, the court does not accept legal conclusions as true. *Id*.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper only when a complaint exhibits either a "(1) lack of a cognizable legal theory or (2) the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Under the heightened pleading standards of *Twombly* and *Iqbal*, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," so that the defendant receives "fair notice of what the…claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 570. The plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. The court will not accept "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. . . ." *Id*.

Plaintiffs' Complaint asserts two causes of action: (1) violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"); and (2) violation of California Business and Professions Code § 17200 ("UCL"). The TCPA was enacted in 1991 in order to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls ... by restricting certain uses of facsimile machines and automatic dialers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). Among other things, the TCPA made it unlawful for any person "to make any call using any automatic telephone dialing system ... to any [cellular] telephone number." 47 U.S.C. § 227(b)(1)(A). A text message is a call within the meaning of the act. *Satterfield*, 569 F.3d at 952; *Baird v. Sabre Inc.*, 995 F. Supp. 2d 1100, 1101 (C.D. Cal. 2014).

Plaintiffs argue that Defendants violated the TCPA because "[i]nstead of obtaining express written consent prior to sending repeated text message solicitations, Microsoft lures potential customers to provide their mobile phone numbers in response to misleading sweepstakes and discount promotions." In a 1992 rulemaking action implementing the TCPA, the FCC ruled that "persons who knowingly release their phone numbers have in effect given their invitation or

permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *In re Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8769 ¶ 31 (1992). Many federal district courts have relied on the 1992 FCC Order ruling to conclude that plaintiffs who provided a business with their telephone number and then received a text message from the business had no claim under the act. *See, e.g., Emanuel v. Los Angeles Lakers*, 2013 WL 1719035, at *3 (C.D. Cal. Apr. 18, 2013); *Roberts v. PayPal, Inc*., 2013 WL 2384242, at *3-5 (N.D. Cal. May 30, 2013); *Ibey v. Taco Bell*, 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012); *Pinkard v. Wal–Mart Stores*, 2012 WL 5511039, at *4-5 (N.D. Ala. Nov. 9, 2012); *Gutierrez v. Barclays Group*, 2011 WL 579238, at *3 (S.D. Cal. Feb. 9, 2011); *Baird v. Sabre Inc*., 995 F. Supp. 2d 1100, 1102-03 (C.D. Cal. 2014). This case is no different than those before it.

Under the FCC's definition, it is undisputed that Plaintiffs "knowingly release[d]" their cellphone numbers to Microsoft when they participated in the promotional activities. Through such acts, Plaintiffs gave permission to be texted at that number by an automated dialing machine. Plaintiffs do not allege that Defendants, unprompted, began sending text messages directly to their mobile phones. Rather, the allegations are clear that it was Plaintiffs who initiated the receipt of text messages from Microsoft by voluntarily participating in Microsoft promotions. In doing so, Plaintiffs not only unequivocally expressed their interest in learning more about Microsoft's promotional offers, but they also provided their consent to receive that information through text messaging.

Plaintiffs' claim under California Business and Professions Code § 17200 is premised entirely on the alleged violation of the federal TCPA and accordingly fails for the reasons explained above. Plaintiffs' UCL claim also fails because they lack standing since they have not suffered any lost money or property. Not only does the UCL incorporate the traditional elements of Article III standing, but it additionally requires that the plaintiff plead an economic injury. *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 322-23 (2011). Under the UCL, a plaintiff suffers an injury in fact when she has "(1) expended money due to the defendants' acts of unfair competition;

(2) lost money or property; or (3) been denied money to which he has a cognizable claim." *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1125 (N.D. Cal. 2010).

Plaintiffs do not allege that they lost money or property, or suffered any economic injury. Rather, Plaintiffs make general and vague allegations such as the receipt of unwanted text messages from Microsoft caused "embarrassment and emotional harm." Plaintiffs go on to allege that "Microsoft's repeated sending of spam text message advertisements . . . has caused [] repeated embarrassment, financial loss, and emotional injury." Such conclusory allegations are insufficient to allege an injury in fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Simply stating one suffered financial loss and lost profits, without more, is nothing more than "conjecture," "speculative," and "hypothetical" – the exact type of allegations that fail to establish harm for the purposes of standing. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). It is therefore apparent that Plaintiffs cannot allege economic injury in order to establish standing under the UCL.

A district court may deny a plaintiff leave to amend if it determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). Even assuming the truth of Plaintiffs' allegations, their claims fail because Microsoft's text messaging program complies with the TCPA. Plaintiffs voluntarily sought specific information about Microsoft promotions, providing both their phone numbers and their express consent to receive that information by texting specific keywords from their mobile phones. There is no cognizable legal theory that could support liability against Defendants, and dismissal with prejudice is appropriate.

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IT IS HEREBY ORDERED that Defendant Microsoft's Motion to Dismiss is GRANTED. (Dkt. No. 19).

IT IS FURTHER HEREBY ORDERED that Defendant HelloWorld's Joinder in Defendant Microsoft's Motion to Dismiss is GRANTED for the reasons stated above. (Dkt. No. 21) Accordingly, Defendant HelloWorld's Motion to Dismiss is moot. (Dkt. No. 16)

Dated: November 17, 2015.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE